JD(ATL)–78–03
Tampa, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

THE HARDAWAY COMPANY

and **CASE 12–CA–19952A**

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO

Rafael Aybar, Esq., for the General Counsel.
Dallas Manuel, Esq., for the National Labor Relations Board Union.
Michael W. Manley and Martin W. Walter, Esqs. and Barry D. Edwards, for the Charging Party.
James M. Walters and Tracy L. Moon, Jr., Esqs., for Respondent.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Tampa, Florida, on October 14 and 15, 2003, pursuant to an Order of the National Labor Relations Board. In its July 31, 2003 Order, the National Labor Relations Board, herein Board, remanded the case for a prompt hearing to be confined to the issue raised by The Hardaway Company, herein Respondent, in its Motion for Summary Judgment based upon laches.[1]

On the entire record,[2] including my observation of the demeanor of the witnesses, and

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[1] My having heard the issue of laches as directed by the Board does not necessarily determine that I will hear the case involving the merits of the complaint allegations.

[2] During the week before the October 14 hearing, Respondent served subpoenas duces tecum on Associate General Counsel Richard Siegel, Regional Director Rochelle Kentov, Regional Attorney Margaret Diaz, Assistant to the Regional Director Karen LaMartin, and National Labor Relations Board Union President Thomas Brudney. Additionally Respondent served a subpoena ad testificandium on

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after considering the briefs[3] filed by the Respondent and the General Counsel, I make the following findings of fact and conclusions of law:

I. Findings of Fact

A. Background

The charge in this matter was filed on February 18, 1999, by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (the Union). In the charge, the Union alleged that The Hardaway Company, (Respondent) violated Sections 8(a)(3) and (1) of the Act by its refusal to hire or consider for hire sixteen named individuals because of their membership in, and activities on behalf of the Union. On August 22, 2002, the Regional Director for Region 12 of the Board issued a Complaint and Notice of Hearing. The complaint alleged that Respondent failed and refused to hire the sixteen individuals named in the charge in violation of Section 8(a)(3) and (1) of the Act and set the matter to be heard by an administrative law judge on January 15, 2003.

On January 2, 2003, Respondent filed a Memorandum in Support of the Hardaway Company's Motion for Summary Judgment or, in the Alternative, Motion to Reschedule the Hearing. On January 6, 2003, the Regional Director for Region 12 issued an Order indefinitely postponing the hearing. On January 7, 2003, the Union filed Suggestions in Opposition to Respondent's Motion for Summary Judgment and the General Counsel filed Counsel for the General Counsel's Response to the Respondent's Motion for Summary Judgment and Alternative Motion to Reschedule the Hearing. Subsequently, Respondent filed The Hardaway Company's Motion for Summary Judgment and Memorandum in Support of the Hardaway Company's Motion for Summary Judgment on March 13, 2003. On May 16, 2003, General Counsel filed The General Counsel's Response to Respondent's Motion for Summary Judgment.

In its July 31, 2003 Order, the Board stated that there were genuine issues of material fact with respect to the reasonableness of the General Counsel's delay in issuing a complaint and whether Respondent was unduly prejudiced by the delay. The Board remanded this case for a prompt hearing to be confined to the issues raised by the motion. In a footnote, the Board noted that directing a bifurcated hearing limited to the laches issue raised by the Respondent's motion is contrary to the usual practice. The Board further stated that it is appropriate to do so under the particular circumstances presented. The Board specifically noted Respondent's assertions that its witnesses are deceased or unavailable and that it is no longer in business. The Board also noted that because of the allegations involved, the hearing on the merits could be lengthy and the fact that Region has not scheduled the hearing until

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former Region 12 Field Attorney Michael Maiman. The General Counsel and the National Labor Relations Board Union, herein NLRBU, filed petitions to revoke Respondent's subpoenas. Based upon the General Counsel's written stipulation of October 10, 2003, I determined that the subpoenaed evidence was no longer relevant and I granted the petitions to revoke. On October 27, 2003 Respondent filed a Request for Special Permission to Appeal Ruling of Administrative Law Judge and Appeal.

[3] General Counsel's post-hearing certified copy of General Counsel Exhibit No. 17 is received as a part of the record. The exhibit was received into evidence during the hearing conditioned upon General Counsel's providing a certified copy.

December 8, 2003.

B. Respondent's Basis for Seeking its Motion for Summary Judgment

Respondent asserts that it is entitled to summary judgment because it has sustained irreparable prejudice to its ability to defend itself because of the three and one-half year delay from the filing of the initial unfair labor practice charge to the issuance of a Complaint and Notice of Hearing. Respondent contends that during the three and one-half year delay, Respondent's primary witness died and the company ceased operating as an ongoing concern. It is also alleged that Respondent's former employees who worked on the Florida project, which terminated in February 2000, are not readily available. Respondent submits that the doctrine of laches and the irreparable prejudice sustained to Respondent's ability to defend itself demand that summary judgment be granted to Respondent.

C. Undisputed Facts

On or about February 18, 1999, the Union filed Charge Number 12-CA-19952 with Region 12 of the Board alleging that since on or about August 19, 1998, to the date of the charge, Respondent refused to hire or consider for hire 16 individuals who applied for employment because of the individuals' membership in and activities on behalf of the Union. The charge identified Project Manager Bob Lassiter as the employer representative. Two and a half months after the charge was filed, Board Agent Michael Maiman sent a letter to Respondent, explaining the union's allegations. Maiman stated that the Union alleged that applications for each of the individuals named in the charge were submitted to Lassiter or to the secretary. Maiman also explained that the Union alleged that when submitting the applications, Union Representative Barry Edwards told Lassiter that all the Boilermaker members could do any fitting, welding, rigging, or ironwork that Respondent had and also that the individuals would work for any wage.

Maiman stated: "In response to the above allegations, I request to take a sworn affidavit from any individual with knowledge of this situation, including Mr. Lassiter." While Maiman explained that the Board considers anything less than the provision of sworn Board affidavits to be less than complete cooperation in the investigation, he also offered: "You may, however, submit any evidence you choose to submit, such as a position statement or documentary evidence, or your own affidavits and it will be considered." Maiman informed Respondent's legal representative that any evidence provided must be submitted by the close of business on Tuesday, May 18, 1999, because at that time a recommendation would be made to the Regional Director based upon the evidence at that time. Maiman explained that he would be available to take affidavits on Friday, May 7 as well as May 17 and 18, 1999. There is no evidence that either Maiman or any other Board agent took affidavits from Lassiter or from any other agent or representative of Respondent. Additionally, there is no evidence that Respondent offered to provide Lassiter or any other company representative to the Board for affidavits on May 7, May 17, May 18, or any other date.

By letter dated May 18, 1999, Respondent submitted a statement of position in response to the allegations set forth in Maiman's letter of May 4, 1999. In its letter, Respondent acknowledges that on or about August 27, 1998, two men appeared at Respondent's Newberry, Florida project office and asked to leave applications with Lassiter.

In its letter, Respondent asserts that Lassiter told the individuals that he was not involved in the hiring process and he took the men into the adjacent trailer where secretary Sherry Roberts was located. Respondent's counsel further asserts in the letter: "This is the only contact between Lassiter and the Union representatives." Respondent further adds: "He specifically denies there were any conversations concerning wages or the types of work that would be performed by the Boilermaker applicants." In the next paragraph of the letter, Respondent's counsel described Project Manager and Vice President Bob Rose's conversation with Union Business Agent Larry Snellgrove and acknowledged Rose's receipt of job applications. The letter describes the comments made by both Rose and Snellgrove. As an attachment to the position statement, Respondent includes a copy of a handwritten note from Lassiter to Rose dated August 27, informing him that a Boilermaker Business Agent left applications with a welder.

By letter dated May 19, 1999, Maiman confirmed receipt of Respondent's May 18, 1999 letter and thanked counsel for his prompt response. Maiman reiterated his earlier request for Respondent's payroll records and applications of all applicants at the site from August 27, 1999 to the time of Maiman's May 19, 1999 letter. He closed by asking; "Please advise me if you will provide this information by noon May 20, 1999, if possible." By letter dated May 24, 1999, Respondent's counsel explained that because the applications and letters from the Union concern the time period from August, 1998 through October, 1998, and the job classifications of welder, rigger, and pipefitter, the information pertaining to all job classifications for a period from August, 1997 to the time of the request far exceeded the union's charge. Respondent also explained that because it did not have a large office staff on the project, gathering the information for the Board's request would take a substantial amount of time and would be very costly.

On June 7, 1999, Region 12 issued a subpoena duces tecum to Respondent, seeking certain books and records for the period from August 1, 1998 to January 31, 1999. On June 14, 1999, Respondent filed a petition to revoke the Board's subpoena. On June 15, 1999, Counsel for the Regional Director filed the Regional Director's Opposition to Employer's Petition to Revoke Subpoena Duces Tecum B-328138. On June 23, 1999, Board Members Sarah M. Fox, Wilma B. Liebman, and Peter J. Hurtgen issued an order denying Respondent's petition to revoke Subpoena Duces Tecum. General Counsel submitted a July 6, 1999 letter from Deputy Regional Attorney David Cohen to Respondent confirming receipt of certain subpoenaed records and requesting full compliance with an investigative subpoena duces tecum[4].

Following Cohen's letter of July 1999, there is no record evidence of any communication between Region 12 and Respondent concerning Case No. 12-CA-19952 until the Regional Director's issuance of a Complaint and Notice of Hearing on August 30, 2002.[5]

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[4] The subpoena duces tecum referenced in Cohen's letter is identified as Subpoena Duces Tecum No. B-328149. The subpoena duces tecum for which Respondent filed its June 14, 1999 petition to revoke is identified as Subpoena Duces Tecum No. B-328138.

[5] In its Memorandum in Support Respondent's Motion for Summary Judgment, Respondent attached a Certification of Attorney Tracy Moon. In the certification, Moon states that in August 2001, he left a voice mail message for Maiman and sent him a letter inquiring into the status of the case. Respondent did not however, submit into evidence the letter referenced in Moon's certification of January 2, 2003.

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The record reflects however, that another charge (Charge No. 12-CA-20367) was filed against Respondent on September 17, 1999. The parties stipulated that on or about December 15, 2000, Respondent submitted a position letter in Case No. 12-CA-20367 to Region 12 Field Attorney Maiman. Attached to the letter was a notarized affidavit of Joel Thompkins; Respondent's former pipe crew superintendent on the Florida Cement Plant project in Newberry, Florida. Thompkins' affidavit is dated December 13, 2000. The parties further stipulate that on or about August 29, 2001, Respondent submitted to Field Attorney Maiman a position letter dated August 29, 2001 in response to an amended charge in Case No. 12-CA-20357. Attached to the letter is a notarized affidavit of Thompkins dated August 27, 2001.

In connection with the October 14, 2003 hearing, Respondent served subpoenas duces tecum on Associate General Counsel Richard A. Siegel, Regional 12 Director Rochelle Kentov, Region 12 Assistant to the Regional Director Karen LaMartin, Region 12 Regional Attorney Margaret Diaz, and Region 12 Field Attorney and NLRBU President Thomas Brudney. In its subpoenas, Respondent sought agency documents showing the minimum, median, and maximum processing times of all unfair labor practices filed between August 1, 1998 and October 3, 2003, as well as inter-agency correspondence or other documents during the same time period which relate to temporal deficiencies or other problems in the intake, processing, investigation, and disposition of unfair labor practice cases in Region 12. The subpoenas also sought all processing/administrative documents related to Case No. 12-CA-19952 as well as documents relating to the assignment to, or reassignment from, Region 12 field Attorney Maiman for any and all representation cases during the same time period. The subpoenas further sought all documents showing which Region 12 professional staff employees performed "duty officer" or 'officer of the day/week" duties during the same time period. In responding to Respondent's subpoena, Deputy General Counsel John E. Higgins, Jr. pointed out in his letter of October 10, 2003, that while Respondent's request did not include any explanation of the purpose of the subpoenaed materials in connection to the October 14, 2003 hearing, the documents appear only relevant to the issue of the reasonableness of the Region's delay in processing the charge in Case 12-CA-19952 from the date of filing to the date of issuance of complaint. Deputy General Counsel Higgins further noted that the Board's July 31, 2003 order specifies that the reasonableness of the delay in issuing the complaint in Case 12-CA-19952 is one of the issues to be litigated at the hearing directed by the Board. Deputy General Counsel Higgins further stated:

> Having given careful consideration to the issue, the undersigned has determined that the delay between the filing of the charge and the issuance of complaint in Case 12-CA-19952 was unreasonable. By letter dated October 9, 2003, you were notified that counsel for the General Counsel will stipulate at the October 14, 2003 hearing that under the facts of the case, the delay between the filing of the charge and the issuance of complaint was unreasonable.

Based upon the proposed stipulation and because reasonableness of the delay was no longer a

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In the certification, Moon asserts that he received no response from Maiman or any other Board representative.

material issue of fact, Deputy General Counsel Higgins denied Respondent's request[6] for Agency personnel to appear and either produce documents or testify at the scheduled hearing.

D. Respondent's Evidence and Rationale in Support of Invoking Laches

Fred James Dodelin is the only witness who testified in behalf of Respondent during the hearing on October 14 and 15, 2003. He testified that he first began working for Respondent in June 1980 and worked for the company until December of 2000. He served as Chief Financial Officer from approximately 1996 until December 2000. Dodelin testified that his only income from Respondent since his employment termination was a commission that he received for selling a piece of real estate in early 2001 and he described himself as Respondent's "last man standing."

1. The Death of Bob Lassiter

Dodelin testified that Project Superintendent Bob Lassiter would have been the "crucial witness" in this case. Lassiter was the first employee of Respondent on the Newberry, Florida project. In 1997, Lassiter went to Newberry as the "only man on the job" and set up the office. Actual construction began the following year. Dodelin testified that Lassiter's work on the project ended in October of 1999 and the project was substantially completed in February of 2000. Initially Lassiter was classified as the project manager. When a project manager was moved in at a level of management above Lassiter, he then became the project superintendent. Dodelin testified that as either project manager or project superintendent, Lassiter was responsible for the "prosecution of the physical work."[7]

Respondent submitted the death certificate of Bob Lassiter, showing that he died of lung cancer on July 29, 2000. The certificate further reflects that the approximate interval between the onset of the disease and his death was only 30 days. Respondent asserts that it had not only been unaware of Lassiter's death but also unaware of his poor health.

Respondent submits that Board Attorney Maiman's letter of May 4, 1999 requests the opportunity to take sworn affidavits from any individual with knowledge of the situation, "including Mr. Lassiter." Respondent asserts that Maiman's failure to indicate any of Respondent's other employees by name indicates that the Board, like Respondent, regarded Lassiter as the key witness in this matter. In its brief, Respondent further asserts: "Although Respondent did not object to the taking of any affidavits, neither Maiman nor any other Board agent ever took affidavits from Lassiter or any other of Respondent's employees." In its brief, Respondent further points to Dodelin's testimony as to why Respondent did not take its own affidavit from Lassiter. Dodelin testified:

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6 By letter dated October 6, 2003, and pursuant to Section 102.118 of the Board's Rules and Regulations, Respondent requested General Counsel to permit certain NLRB employees to testify and to furnish documents pursuant to the outstanding subpoenas.

7 While Respondent asserts in its brief that such responsibility included hiring workers, Dodelin's testimony concerning Lassiter's duties as project superintendent or project manager did not specifically address the hiring of workers. Respondent's position statement of May 18, 1999 states that Lassiter told Union representatives on August 27, 1998 that he was not involved in the hiring process at that time.

> Basically, there were two reasons. First, I didn't know he was going to die. Secondly, I thought that the whole matter was over with. We produced some records, had a man bring records up to Tampa. I thought the whole matter was over with, quite honestly. I thought that whole thing was gone.

Respondent submits that its inability to produce its crucial witness is not due to its own lack of diligence. Additionally, Respondent maintains that had the Board proceeded in a timely manner, Lassiter would have been available as Lassiter was alive for more than a year after the charge was filed. Respondent submits that the failure to capture his testimony is the fault of the Board, not Respondent.

E. The Unavailability of Respondent's Joint Venture Partner

Respondent's Newberry project was a joint venture with Stone & Webster, a company that Respondent partnered with to build a cement plant for Florida Rock in Newberry, Florida. Respondent was a sixty percent joint venture partner and Stone and Weber held the remaining forty percent of the partnership. Dodelin testified that the project was substantially completed in February 2000 and shortly thereafter, Stone and Weber filed for bankruptcy. He further testified that after the completion of the Newberry construction project, Respondent had no other construction projects in the State of Florida. Respondent substantially completed an additional construction project in Chattanooga, Tennessee in June 2001.

Respondent submits that had the Board acted with any kind of diligence, the case would have been processed while Stone & Webster would have shared in any liability. Respondent argues that the loss of its joint venture partner shows undue prejudice to Respondent because it is now liable for all of any judgment.

F. Respondent's Changes in Operation and Net Worth

Dodelin testified that Respondent presently has no employees and has had no employees since December 2001. He testified that at the end of 1999, Respondent had a net worth of about $3.5 million. He explained that Respondent had "several pretty bad jobs" and it thereafter depleted its working capital. Dodelin further testified that by the end of 2000, Respondent's net worth was "somewhere in the neighborhood of $350,000" and by June 2001, Respondent had completely ceased operations. Dodelin testified that by the time that the Board issued its complaint in 2002, Respondent's liabilities exceeded its assets by $2,087,879.

Respondent submits that it has been unduly prejudiced by the Board's delay because it was a viable company when the charge was filed, but not when complaint issued. Dodelin testified that Respondent currently has about $9,000 in cash that is unrestricted and not reserved to satisfy other claims and obligations. Accordingly, Respondent argues that while the Board sat on this case, by its "unreasonable delay," the resources with which Respondent could pay any judgment dwindled away.

II. Analysis and Conclusions

A. The Applicability of Laches

Respondent asserts that its is undisputed that the August 3, 2002, complaint did not issue against Respondent until after three and one-half years passed from the filing of the charge in February 18, 1999. Respondent submits that the inordinate delay has irreparably prejudiced Respondent's ability to defend itself. Respondent argues that the doctrine of laches and the prejudice to Respondent caused by the Board's inordinate delay demand that summary judgment be granted.

As noted by the Supreme Court in its 1961 decision, the elements of proof required by the equitable defense of laches are (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. *Costello v. United States*, 365 U.S. 265, 282 (1961). Laches is based upon the maxim, "vigilantibus non dormientibus aequitas subvenit," meaning "equity aids the vigilant, not those who sleep on their rights." *Ikelionwu v. United States*, 150 F.3d 233, 237 (2nd Cir. 1998), *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259 (2nd Cir. 1997).

It is well settled however, that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights. *United States v. Summerlin*, 310 U.S. 414, 416, 60 S. Ct. 1019, 1020 (1940), *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 34 (7th Cir. 1977). In *Costello v. U.S. supra*, the Supreme Court considered a petitioner's argument that the government's delay of 27 years in bringing a denaturalization proceeding denied him due process. In rejecting the petitioner's argument, the Court referenced its earlier decisions and those of the lower courts, in applying the principle that laches is not a defense against the sovereign. The Court noted that the reason underlying this principle, as previously stated by Justice Story[8] "is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." In a 1984 decision, the Court dealt with the United States Court of Appeals for the Third Circuit's modification of a Board backpay order because of the length of time that elapsed after the court's original judgment. Upon review, the Supreme Court found that by restricting the beneficiaries of the Board's remedy and abridging procedures lawfully established by the Board for determining the amount of backpay, the Circuit Court punished employees for the Board's nonfeasance. *NLRB v. Ironworkers, Local 480*, 466 U.S. 720, 724-25 (1984).

It has, in fact, long been observed by the Supreme Court and the Board that the defense of laches does not lie against the Board, as an agency of the United States government. *NLRB v. Rutter Rex Mfg., Co.,* 396 U.S. 258 (1969); *Harding Glass Company, Inc*., 337 NLRB No. 175 at p. 4 (2002); *Consolidated Casinos Corp*., 266 NLRB 938, 992 (1983); *Merrill M. Williams*, 265 NLRB 506, 508 (1982). As the Board stated in *F.M. Transport, Inc*., 302 NLRB 241 at 241 (1991), "Even in instances of unreasonable delay in the prosecution of cases before the Board, the doctrine of laches has not been applied where this would place the consequences of agency delay on wronged employees to the benefit of those

8 *U.S. v. Hoar,* 26 Fed. Cases 329, 330 (No. 15,373).

who have wronged them." Repeatedly, the Board has declined to apply the doctrine of laches even when there has been an inordinate delay between the filing of the charge and the issuance of complaint. See *Tri-County Roofing, Inc*., 311 NLRB 1368 (1993)[9], Roofing*, Metal & Heating Associates, Inc*., 304 NLRB 155 (1991),[10] *Tide Water Associated Oil Co*., 85 NLRB 1096 (1949),[11] *Quarles Mfg. Co*., 83 NLRB 697 (1949).[12]

Respondent acknowledges that "generally the defense of laches is inapplicable to the Board's proceedings," noting the Board's ruling in *St. Anthony Hospital Systems*, 319 NLRB 46, 51 (1995), where a delay of over 12 years from the filing of the original charge until the issuance of the amended consolidated complaint[13] was not found to constitute a due process level of prejudice sufficient to invoke laches. Respondent argues however, that the use of the term "generally" recognizes that there are exceptions and cases where the defense of laches is applicable.

Respondent argues that in *Northern Stevedoring & Handling Corp., Etc.,* 143 NLRB 8 (1963), the Board relied in part on a delay of approximately one and one-half years between the filing of a charge and issuance of a complaint in deciding to dismiss the complaint. The facts of that case however, are clearly distinguishable from those in the instant case. While the Board in that case noted the length of time that had elapsed since the filing of charges and the issuance of the complaint, it also noted that the disputed contractual provisions were no longer in effect and the General Counsel did not oppose dismissal of the complaint.

In its memorandum in support of its motion for summary judgment, Respondent cites no other Board cases in which the matter was dismissed because of the delay between the filing of the charge and the issuance of complaint or which otherwise would appear to follow the doctrine of laches. Respondent points however, to the Eighth Circuit's decision in *EEOC v. Liberty Loan Corp*., 584 F.2d 853 (8th Cir. 1978) and asserts that laches was applied against a United States government agency where the court found the delay of four years by the Equal Employment Opportunity Commission, herein EEOC, to be unreasonable. The Court affirmed the district court's dismissal of the EEOC's suit where there was an inordinate delay in initiating the suit. Respondent argues that the facts of that case are "nearly identical" to those of the instant case. In *Liberty Loan Corp*., the company closed substantially all of its offices and the company no longer employed the supervisors and persons responsible for the company's personnel policies by the time that EEOC filed suit. Of the 145 employees employed by the company at the time of the initial charge, only five were still with the company when EEOC brought suit. While the facts certainly bear resemblance to facts in the current matter, I note that the neither the District Court nor the Eighth Circuit Court of Appeals in reviewing this case, applied the common law doctrine of laches. As pointed out in the Eighth Circuit's decision, the District Court's opinion did not rely on the laches doctrine

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9 Involving a delay of 23 months between the original charge and the complaint.

10 Involving a delay of 19 months between the original charge and the complaint.

11 Involving a delay of almost 18 months between the original charge and the complaint.

12 Although the issuance of the complaint occurred almost 18 months after the filing of the charge, the Board noted that such delay was not attributed to the charging party.

13 I note however, that individual complaints issued after the respective charges and before the issuance of the amended consolidated complaint.

in dismissing the suit because the Court was uncertain whether the laches doctrine can be applied to bar actions by the sovereign. The Court of Appeals stated: "We express no opinion on whether the doctrine can operate to bar federal agency action since we dispose of this case on narrower grounds." In dismissing the suit, the Court relied upon the section of the Administrative Procedure Act that allows a reviewing court to compel agency action unlawfully withheld or unreasonably delayed. *5 U.S.C.A. Section 706(1)*. The court also noted that many of those courts[14] that have applied Section 706(1) in dismissing dilatory agency actions have simultaneously refused to apply the laches doctrine because of its uncertain parameters.

In its brief, General Counsel acknowledges that the U.S. Supreme Court in *Occidental Life Insurance Co. of California v. EEOC*, 431 U.S. 355, 373 (1977), indicated that the laches doctrine might apply, in certain instances against the EEOC. General Counsel also concedes that relying on *Occidenta*l, some courts have permitted the laches doctrine to be applied against the EEOC.[15] General Counsel submits however, that only the Seventh Circuit Court of Appeals has suggested extending this doctrine to non-EEOC cases.[16] General Counsel argues however, that subsequent to its decision in *Occidental*, the Supreme Court issued its decision in *NLRB v. Ironworkers, Local 480*, 466 U.S. 720, 104 S.Ct. 2081 (1984), finding that the principle of *Rutter-Rex* remains applicable.

On June 28, 1952, the United States Court of Appeals for the Fifth Circuit entered a judgment enforcing a Board order requiring the employer to make whole 11 employees who were discriminatorily discharged. On February 11, 1955, the Board initiated civil contempt proceedings against the employer, alleging a failure to comply with the decree enforcing the Board's order. Ultimately the back pay specification did not issue until March 25, 1959, nearly four years after the Court's last order approving the parties' stipulation for the issue to be resolved through interlocutory hearings before the Board and the Court. The employer argued that the back pay claims were barred by laches. In rejecting the employer's argument, the court noted that it is well settled that the United States, or any agency thereof, is not bound by state statutes of limitation or subject to the defense of laches in enforcing a public right. The Court further noted: "The National Labor Relations Board does not exist for the

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14 The Court noted one instance in which the laches doctrine was applied to bar EEOC's action. In that instance, the court found that the EEOC's issuance of a "right-to-sue" notice, without being requested by the charging party to do so, and the charging party's failure to bring an action within time allowed, extinguished the right of the EEOC to maintain an action on charging party's behalf. *EEOC v. C&D Sportswear Corp*., 398 F. Supp 300 (M.D. Ga. 1975).

15 *EEOC v. Dresser Industries*, 558 F.2d 1196, 1201-04 (11th Cir. 1982); *EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988); *EEOC v. Alioto Fish Co., Ltd*., 623 F.2d 86, 88 (9th Cir. 1980).

16 In *NLRB v. Ryder/P.I.E. Nationwide, Inc*., 894 F.2d 887, 894 (7th Cir. 1986), the Court discussed the application of laches in both its prior decisions as well as those of the Supreme Court. The Court referenced its earlier decision in *EEOC. v. Vucitech, supra*, noting that government suits in equity are subject to the principles of equity, and adding "… laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties." The Court went on to add that harm claimed by a defendant must be more than simply impairment in the ability to mount a defense. The Court further opined that mere delay is not enough to show laches, there must be harm to the defendant. The Court also noted that all relevant harms must be considered and not just the harm to the defendant, citing the Supreme Court's decision in *NLRB v. Ironworkers*, supra at 724-25. The Court nevertheless found that the delay was not unreasonable and there was no harm.

adjudication of private rights; it acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." The Court added: "The fact that these proceedings operate to confer an incidental benefit on private persons does not detract from this public purpose.[17]" The Court agreed with the Board that the claims set forth in the back pay specifications were not barred by limitations or laches, and further found that the evidence offered by the petitioner to show irreparable injury caused by the delay was irrelevant. *Nabors v. NLRB*, 323 F.2d 686, 689 (5th Cir. 1963), cert. denied 376 U.S. 911 (1964).

There is no record evidence that the Regional Office made any attempt or had any contact with Respondent concerning Case 12-CA-19952 from July 1999 until August 2002, when complaint issued in this matter. The delay in this case is somewhat similar to the circumstances in *NLRB v. Rutter-Rex Mfg. Co*., 396 U.S. 258 (1969). In February 1956, the Board ordered the employer to reinstate and make whole a group of unnamed strikers. While the order did not name the specific individuals involved, it left resolution of the reinstatement and backpay to the compliance stage of the proceedings. On August 21, 1957, the Board's regional office sent the company the standard letter describing compliance procedures. On November 7, 1957, the employer wrote to the regional office stating that it had complied with "some of the provisions of the decree" and asking that the regional office bring "any instance of a failure to fully comply with the order" to the employer's attention. The regional office did not answer the letter and the employer heard nothing until March 22, 1960, when a Board compliance officer notified the employer that the case had been assigned to him, and requested payroll records and other records necessary to determine the employment and back-pay rights of employees. It was not until November 16, 1961, that the regional office issued a 428-page back pay specification. The employer applied to the Court of Appeals for a permanent stay of further action in the back-pay proceedings, alleging that the Board had delayed improperly in issuing the specification. In response, the Board argued that the delay was caused in part by the great complexity of the task in processing the strikers' claims, and in part, by the extremely heavy caseload and severe staff limitations in the New Orleans regional office during the late 1950's. The Court of Appeals denied the stay and an administrative law judge later heard the compliance proceeding. The Board adopted the judge's decision with minor modifications on June 6, 1966. Both the judge and the Board considered and rejected the employer's contention that the delay in issuing the specification should bar the back-pay award, either in whole or in part.

On review, the Court of Appeals found that the Board was guilty of "inordinate" delay, in violation of Section 6(a) of the Administrative Procedure Act, 60 Stat. 240, 5 U.S.C. Section 555(b) and to the prejudice of the employer, which had been "lulled into the belief that the Board was satisfied and that no further action was to be expected." Certainly, in this case, Respondent may also argue that having heard no more from the regional office after July 1999, it too could assume that "no further action was to be expected."

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17 The Court further opined that there was no indication that Congress intended to overrule this long-settled doctrine by the enactment of the Administrative Procedure Act, 5 U.S.C.A. Section 1001 et. seq., noting that sections 6(a) and 10(e) of that Act gave the employer a remedy to "compel agency action" that was "unreasonably delayed."

When the case was appealed to the Supreme Court, the Court noted its previous decisions where it had held that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. See *NLRB v. Electric Vacuum Cleaner Co*., 315 U.S. 685, 698, 62 S. Ct. 846, 852, (1942); *National Labor Relations Board v. Katz*, 369 U.S. 736, 748 fn. 16, 82 S.Ct. 1107, 1114 (1962). The Court opined that wronged employees are at least as much injured by the Board's delay in collecting their back pay, as is the wrongdoing employer. In reversing the Court of Appeals, the Court acknowledged: "We do not mean that delay in the administrative process is other than deplorable" and added "It is deplorable, if, as the Court of Appeals thought, the company was hampered in the presentation of its defenses to the back pay specification by the delay." The Court nevertheless opined that it was more deplorable if innocent employees lived for some years on reduced incomes as a combined result of the delay and the company's illegal failure to reinstate them. Although the Court's decision in *Rutter-Rex* deals with the processing of a case at the compliance stage and after merit has already been found to the complaint allegations, I don't find those facts sufficiently distinguishable from the instant case. In both instances, the employer had an arguable basis for believing that the Board's regional office planned no further action. In *Rutter-Rex*, the employer had an even more compelling basis for such an assumption when the region did not respond to the employer's letter specifically asking the regional office if anything further was required.

In the instant case, the regional office's delay is not only deplorable but also inexcusable. General Counsel admitted that its delay was unreasonable and there is no record evidence of any factor that would excuse or explain such a delay. Despite this inordinate and unreasonable delay however, the law is well established that the "Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." cc *Harding Glass Co. Inc*., 337 NLRB No. 175, slip op. at 4 (2002), *Mid-State Ready Mix*, 316 NLRB 500 (1995), citing *Carrothers Construction Co*., 274 NLRB 762, 763 (1985).

In its brief, General Counsel argues that the present law is clear that the defense of laches is not available against a U.S. Government agency, including the Board, where the agency is enforcing "public right." General Counsel submits that to hold otherwise would be to circumvent over sixty years of consistent Supreme Court and Board law. Considering both the prevailing Supreme Court decisions and those of the Board, I do not find the equitable doctrine of laches applicable to the matter herein.

B. If Laches were Applicable, Has Respondent Met the Necessary Burden of Proof

While I do not find laches applicable in this case, I have in the alternative, also considered whether Respondent has proven the requisite elements for a laches defense. Laches requires proof of (a) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.[18] As discussed above, General Counsel stipulated that the delay in issuing the complaint in this matter was unreasonable. During the course of the hearing, Respondent's counsel asked for a broader stipulation that the delay was also due to inexcusable delay and/or lack of diligence. Counsel for the General

[18] *Costello v. United States*, *supra* at 282.

Counsel declined to enter into such a stipulation. Based upon the record evidence however, I do not find the broader stipulation necessary to satisfy the first prong of proof for the defense of laches. General Counsel stipulated that the delay between the filing of the charge and the issuance of complaint was unreasonable. More importantly, General Counsel offered no evidence to provide any explanation for this unreasonable delay.[19]. Accordingly, inasmuch as General Counsel has failed to demonstrate that the delay was excusable or that the region acted with diligence, the record evidence supports a finding that the Board's regional office acted without diligence and the first prong of the laches defense is clearly met.

C. Respondent's Prejudice

1. The Unavailability of Bob Lassiter

Having found that there was a lack of diligence, I have further considered whether there was the requisite prejudice. Respondent asserts that upon receipt of the complaint in August 2002, Respondent attempted to locate Bob Lassiter. Respondent asserts that it learned in late December 2002 that Lassiter died on July 29, 2000. Respondent submits that Lassiter's death certificate reflects the presence of lung cancer for only a 30-day period prior to his death and thus his death resulted from sudden-onset cancer. Respondent argues that it was not only unaware of Lassiter's death but also unaware that Lassiter was in ill health. Respondent contends that its ability to defend against the alleged unfair labor practices is prejudiced by the unavailability of this witness. Respondent further argues that Lassiter was the central figure in this case and would have been Respondent's primary witness. Respondent further argues that while he is the individual to whom the Union alleges the applications for employment were submitted and with whom the Union alleges that a conversation occurred regarding the qualifications of the applicants, neither Respondent nor the Board obtained a sworn statement from Lassiter prior to his unexpected demise. Respondent argues, "Traditionally, laches is invoked when witnesses have died or evidence has gone stale." *Trustees for Alaska laborers-Construction Industry Health and Sec. Fund v. Ferrell*, 812 F.2d 512, 518 (9th Cir. 1987).

Dodelin testified that Respondent did not secure Lassiter's testimony because he thought the matter was over after Respondent provided records and that, based on his limited experience, he believed that unfair labor practice investigations were over in a few months. I note however, that Dodelin did not testify that he was involved in any way in assessing Respondent's proof or in determining what evidence Respondent would give to the Board in response to the Union's charges. The record reflects that even during the initial investigation of the charge, legal counsel represented Respondent. While Field Attorney Maiman requested that Respondent provide sworn affidavits to the Board, Respondent chose in the alternative to provide a position statement from its counsel. While Dodelin testified that he assumed that the matter was over after Respondent provided records to the Board, there is no evidence that

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[19] General Counsel denied Respondent's requests for authorization for Agency personnel to appear and either produce documents or testify at the October 14, 2003 hearing. Additionally, General Counsel and the NLRBU filed, and the undersigned granted, petitions to revoke subpoenas duces tecum that would otherwise have required the testimony of Agency personnel. Accordingly, General Counsel presented only Union Representative Barry Edwards to testify.

this assumption was based upon any assurance or representation by Maiman or any other Region 12 staff member. While Respondent asserts that it is prejudiced by the Board's unreasonable delay, it is undisputed that it was Respondent's decision to not memorialize or preserve Lassiter's personal account of the facts in issue.

Despite Respondent's claim that Lassiter would have been the central figure and Respondent's primary witness, the evidence does not support this assertion. In the position statement to the Board dated May 18, 1999, Respondent's counsel contends that Lassiter spoke only once with Union representatives when the representatives visited the site to leave employment applications. Respondent's May 18, 1999 position statement further contends that Lassiter told the Union Business Agent on August 27, 1998 that he was not involved in the hiring process at that time and he took the two men into the adjacent trailer where Sherry Roberts was located. Respondent's counsel states that Lassiter denies having any conversations concerning wages or the types of work that would be performed by Union applicants. Respondent asserts that on or about August 27, 1998, and the same day that the Union representatives left applications at the job site, two Union representatives spoke with Project Manager and Respondent's Vice President Bob Rose in his office. During the conversation between the Union representatives and Rose, the representatives talked about the Union's ability to provide applicants to perform Boilermakers' work and volunteered "they would work for scale." Respondent further confirms that during the conversation, the representatives left three employment applications with Rose. Thus, Respondent's own position statement contradicts the testimony of Dodelin in contending that Lassiter was a crucial witness. Respondent's position statement denies that Lassiter had any role in hiring employees and asserts that the applicants were directed to both Sherry Roberts and Project Manager Rose. As Counsel for the General Counsel points out in his brief, the Board has historically considered prehearing position statements as admissions of respondents in certain cases. *J.R.L. Food Corp*., 336 NLRB 111, fn. 26 (2001), *Steve Aloi Ford, Inc.*, 179 NLRB 229, 231 (1969). In this case, I find the statements and admissions in Respondent's position statement more compelling evidence than Dodelin's testimony. Dodelin admitted that his knowledge of the allegations involved in the unfair labor practice charge is extremely limited. He had no recollection of speaking with either Lassiter or Rose about the charge. Inasmuch as Respondent's position statement was written three months after the filing of the charge, it is reasonable that Respondent's description of the facts and circumstances at that time would be more accurate than Dodelin's testimony occurring more than four years later.

Dodelin testified that Office Manager Sherry Roberts was probably working at the job site in August 1998. Dodelin admitted that he has made no attempt to contact either Bob Rose or Sherry Roberts. When asked on cross-examination if he knew of anyone with the company who has tried to contact either Rose or Roberts, he simply responded that he had not done so. Respondent presented no other evidence to show that it attempted to contact Rose, Roberts, or any other managers or employees who had knowledge of the underlying facts. In *Roofing, Metal & Heating Associates, Inc.,* 304 NLRB 155, 160 (1991), respondent argued that it was prejudiced by the Board's delay in issuing a complaint. In rejecting the respondent's assertion of prejudice, the judge found a dearth of evidence tending to show that efforts were made to contact a witness that the respondent claimed to be inaccessible. Affirmed by the Board, the judge found the respondent's efforts showing prejudice were, at best, obscure and fell short of justifying the invocation of laches either factually or as a matter of law. In the instant case, Dodelin admits that Respondent not only maintains copies of its

hiring policies and procedures, but it has also retained employee records covering the time periods for employees' employment with Respondent. Neither Dodelin nor any other witness testified as to any efforts made to locate Rose, Roberts, or any other former employees.

Dodelin testified that he is the "last man standing" and his testimony implies that Respondent's managers and employees are no longer available to testify or assist in gathering necessary records. Based upon Dodelin's additional testimony, it appears that some of Respondent's same managers and administrative personnel are also to be found in a different, but related entity. Mason Lampton owns 100 percent of Respondent. Lampton and his son own 100 percent of Standard Concrete Products, herein SCP. Betty Lindsey worked for Respondent for approximately 40 years and was last employed as Respondent's Vice-President of Human Resources. She now serves as Vice-President of Human Resources for SCP. Larry Paul is currently Executive Vice-President/Florida Division for SCP. Just prior to beginning his employment with SCP, he was employed with Respondent. Charles Norris, whose work involves data processing, worked for Respondent and is now employed with SCP. While Fred Dodelin served as Chief Financial Officer for Respondent, he now serves as Chief Financial Officer for SCP. Dodelin is the current registered agent for both Respondent and SCP. Both SCP and Respondent have the same business address in Columbus, Georgia.

During the course of the hearing, Counsel for the General Counsel sought to admit various documents into the record to show the interrelatedness of Respondent and SCP. While many of the documents were rejected because of General Counsel's inability to authenticate the documents and/or the hearsay contained therein, Dodelin's testimony established the entities' common ownership. The record also reflects that some of the same employees performing a previous function with Respondent are now performing that same function with SCP. Based upon the narrow scope of this hearing as well as the limited record evidence, I make no findings with respect to the relationship between Respondent and SCP.[20] There is however, sufficient record evidence to conclude that Respondent not only maintains employment records for the pertinent period in issue, but Respondent also has ready access to some of the same administrative and managerial personnel who were previously employed with Respondent.

2. Changes in Respondent's Operations and Resources

As further proof of prejudice, Respondent submits that at the time that the charge was filed, Respondent was a viable company with a construction operation that could have employed the applicants in questions, had General Counsel prevailed. Respondent asserts that while it had a net worth of approximately $3.5 million at the time the charge was filed, it now has $9,000 in cash and no construction operation. While Counsel for the General Counsel

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[20] During the trial, Counsel for the General Counsel offered into evidence a Dunn & Bradstreet report dated May 15, 2003 that was obtained from the internet. The report indicates that on May 21, 2002, the business name for Respondent changed to SCP. Dodelin testified that the information in this report concerning the change in the business name is not accurate and he denied providing such information to Dunn & Bradstreet. He admitted however, that in May 20002; he had been both an officer of Respondent and SCP. General Counsel Exhibit No. 22 was rejected as hearsay evidence. It is also noted that General Counsel Exhibit No. 21 purports to be a Dunn & Bradstreet Report dated October 7, 2003 and the report relates to Respondent with no reference of a name change to SCP.

asserts that Respondent's ability to provide a backpay remedy in this case is not relevant to a laches defense, Counsel does not cite any specific authority for this premise. In its brief, Respondent cites cases in which the courts have noted, "traditionally, laches is invoked when witnesses have died or evidence has gone stale."[21] Respondent does not cite however, any Board authority for the application of laches based upon a respondent's independent change in business operations or loss of business and revenue. While Respondent does not argue that estoppel applies, there is no evidence that Respondent's cessation of its construction operation or its loss of revenue was in any way related to the Region's actions or inaction in this matter.

Counsel for the General Counsel argues in his brief that even if Respondent is found to have committed the violations alleged in the Complaint and is now unable to provide a backpay remedy, it is the alleged discriminatees who are prejudiced and not Respondent. Counsel's argument has merit. Further, I am unaware of any Board authority for the premise that the processing of an unfair labor practice charge is defeated by a respondent's asserted inability to provide a remedy or its bankruptcy status.[22] Certainly, if a respondent could avoid liability for alleged unfair labor practices by claiming insolvency, the Board's ability to effectuate the Act would be seriously impaired, if not extinguished.

3. Respondent's Loss of its Joint Venture Partner

Respondent submits that the Newberry project was a joint venture with Stone & Webster, a company that partnered with Respondent to build a cement plant. As a joint venture partner, Stone & Webster was liable for 40 percent of any judgment or settlement against the venture. After the project was completed, Stone & Webster filed for bankruptcy. Respondent contends that, had the Board acted with any diligence, the case would have been processed while Stone & Webster would have shared in any liability. Respondent contends that it is prejudiced because it is now liable for all of any judgment. General Counsel submits however, that joint employers who commit unfair labor practices are held jointly and severally liable for 100% of any backpay remedy ordered in a Board case.[23]

Dodelin testified that while the joint venture between Respondent and Stone & Webster ended, the agreement was a standard joint venture agreement. The agreement contained a bankruptcy provision that terminated Stone & Webster's profits, vote, and interest. Dodelin explained however, that while a joint venture partner loses the money that it puts into the venture upon bankruptcy, there is a continuing obligation for the liabilities. Accordingly, while Stone & Webster's resources may be limited by its bankruptcy status, Respondent has not demonstrated that Stone & Webster has no continuing liability.

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21 Citing *Trustees for Alaska Laborers-Construction, Industrial, Health, and Sec. Fund* v. *General Laborers' Union*, 812 F.2d 512, 518 (9th Cir. 1987) (citing *People of the Village of Gambell v. Hodel*, 774 F.2d 1414, 1427 (9th Cir. 1985).

22 The Board has, in fact, found that an employer is not relieved of its obligation to provide a traditional backpay remedy merely because it has become a debtor-in-possession under the Bankruptcy Act and believes that, as a result thereof; it would be financially unable to meet a union's bargaining demands. *Nathan Yorke, Trustee in Bankruptcy*, 259 NLRB 819, 820 (1981).

23 Citing *Capitol EMI Music, Inc*., 311 NLRB 997 (1993); *NLRB v. Browning-Ferris Industries, Inc*., 259 NLRB 148 (1981), enfd. 691 F.2d 1117.

4. Whether Respondent has demonstrated prejudice sufficient for the laches doctrine

Respondent argues that it has been prejudiced because of a number of events that occurred during the three-and-a-half year period following the Union's filing of the unfair labor practice charge. Respondent submits that after providing documents pursuant to an investigative subpoena, it assumed that the Board was not going to take further action on this charge. During this same time period however, Respondent was aware that the Board was investigating a second charge against Respondent that was filed after on September 17, 1999. In response to the second charge identified as 12-CA-20367, Respondent submitted a position statement on December 15, 2000, which was accompanied by an affidavit from Respondent's pipe crew superintendent. On August 29, 2001, Respondent provided another position statement to the Board in response to an amended charge Case No. 12-CA-20367. Based upon Dodelin's testimony, Respondent appears to contend that it relied upon the Board's idleness in 12-CA-19952 to assume that it had no further liability. The fallacy in this argument is shown by the fact that the Board's investigation of another charge spanned a period of at least two years. Accordingly, Respondent can certainly be said to have notice of the Region's lengthy investigative process.

Although Respondent asserts that it was prejudiced by the Regional Office's unreasonable delay in issuing complaint in this matter, Respondent had the opportunity to avail itself of legal recourse under the Administrative Procedure Act. Under 5 U.S.C.A., Section 706 (1), a reviewing court may compel government agency action that is found to be unlawfully withheld or unreasonable delayed. One of the cases cited by Respondent in its memorandum in support of its motion for summary judgment is a case where the United States Court of Appeals for the Eighth Circuit applied this section of the APA in finding that a four-year delay by EEOC was unreasonable[24]. Had Respondent felt that it was being prejudiced by the Region's delay in processing the present case, Respondent could have sought the court's assistance in compelling the Board's action.

Thus, although Respondent asserts that it is prejudiced by the loss of a crucial witness and the change in its business operations, I do not find that Respondent has demonstrated a "due-process level of prejudice" as considered by the Board in *St. Anthony's Hospital Systems*, 319 NLRB 36, 51 (1995). In *St. Anthony's* the respondent argued that it was prejudiced by the Board's 12-year delay in adjudicating the alleged unfair labor practices. The respondent contended that during the 12-year period, it purged its personnel files after seven years and there was a complete turnover in human resources executives and the loss of all staff persons having labor relations responsibilities during the periods in issue. Affirmed by the Board, the judge found that the respondent's institutional foresight was the principal cause for a lack of litigation records and further found that there had been no showing that individuals with germane knowledge of the past could not be located. As discussed above, the record does not support Respondent's assertion that without Lassiter's testimony, it cannot defend against the alleged unfair labor practices. While the record reflects that other witnesses may have had as much contact or more contact with Union representatives, Respondent has demonstrated no attempt to locate those individuals. Additionally, the record does not fully support Respondent's contention that its joint venture partner is no longer liable

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24 *EEOC v. Liberty Loan Corp*., 584 F.2d 853 (8th Cir. 1978).

for any judgment. Finally, there is no basis to find that the doctrine of laches would apply based upon Respondent's assertions of insolvency or financial inability to provide a remedy. During the time period in which Respondent alleges that its net worth was continuing to decrease, the charge was still pending. Counsel for Respondent asserts in his brief that by the end of 2001, Respondent "had no employees and was in the red to the tune of $700,000." The record also reflects however, that in August 2001, Respondent was aware that the Board was still investigating another unfair labor practice charge that had been filed in September 1999. Despite the status of the other unfair labor practice charge, and despite the change in Respondent's operations, there is no record evidence that Respondent attempted to determine the status of this case[25] or to preserve any evidence that might be essential in defending against this charge. Accordingly, Respondent proceeded at its own risk in failing to make inquiry or in failing to preserve the testimony of potential witnesses.[26] At the very least, Respondent could have maintained contact with those potential witnesses that would have been needed should merit be found to the charge.

Conclusions

Having considered the record evidence and the parties' briefs and oral arguments, I do not find that the evidence supports Respondent's Motion for Summary Judgment based upon the doctrine of laches and I recommend that Respondent's Motion be denied.

Dated at Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

25 As an attachment to Respondent's memorandum in support of its motion for summary judgment, Respondent's attorney Tracy L. Moon asserts in a "certification" that in August, 2001, he left a voice mail message for Maiman and sent Maiman a letter inquiring into the status of the case. At hearing, Respondent neither offered a copy of the letter nor any other proof in support of this assertion.

26 *Ryder Integrated Logistics, Inc.*, 329 NLRB 1493 (1999).